IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
SUMMARY STATEMENT OF THE MATTER INVOLVED	2
QUESTIONS PRESENTED	11
SPECIFICATION OF ERRORS TO BE URGED	12
REASONS FOR GRANTING THE WRIT	14
I. This petition presents questions of great public importance which have not been but should be authoritatively determined by this Court	14
II. The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and with the decisions of other Circuit Courts of Appeals as to the interpretation of said decision	16
III. The decision of the Circuit Court of Appeals is in conflict with decisions of the Second and Eighth Circuit Courts of Appeals on the same matter	22
IV. The Circuit Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision	24
CONCLUSION	27

TABLE OF CASES CITED.

	PAGE
Addyston Pipe etc. Co. v. *United States*, 175 U. S. 211	17
Albrecht v. *Kinsella*, 119 F. (2d) 1003	20
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	16, 18, 19, 20, 21, 22, 26
Appalachian Coals, Inc. v. *United States*, 288 U. S. 344	25
Atl. C. L. R. R. v. *Standard Oil Co.*, 275 U. S. 257	20
Chicago Board of Trade v. *United States*, 246 U. S. 231	24
Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373	18, 25
Fed. Trade Comm. v. *Raymond Co.*, 263 U. S. 565	17
Great Atlantic & Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46	22
Hemphill v. *Orloff*, 277 U. S. 537	19
International Ladies' G. W. Union v. *Donnelly G. Co.*, 119 F. (2d) 892	20
Levering & G. Co. v. *Morrin*, 289 U. S. 103	20
Pick Mfg. Co. v. *General Motors Corporation*, 80 F. (2d) 641; aff'd, 299 U. S. 3	25
Public Utilities Comm. v. *Landon*, 249 U. S. 236	20
Schechter Corp. v. *United States*, 295 U. S. 495	20
United States v. *Colgate & Co.*, 250 U. S. 300	17
United States v. *General Electric*, 272 U. S. 476	18
United States v. *Gold*, 115 F. (2d) 236	20
United States v. *Socony Vacuum Oil Co.*, 310 U. S. 150	26
Whitwell v. *Continental Tobacco Co.*, 125 Fed. 454	22
Wood v. *The United States*, 16 Pet. 342	27
Worthington v. *United States*, 64 F. (2d) 936	27

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgments of conviction rendered against each of the petitioners, after trial and verdict by the United States District Court for the Northern District of Indiana, in a criminal prosecution for conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law.

Opinions Below.

The opinion of the District Court on demurrer to the indictment is reported in 26 Fed. Supp. 353. The opinions of the Circuit Court of Appeals are not yet reported. They are printed in volume VIII of the record, the original opinion at pages 4574 to 4630 and the opinion on petition for rehearing at pages 4632 to 4634.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 1, 1941.[1] Petitions for rehearing duly filed by petitioners were denied on July 2, 1941.[2] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after verdict in Criminal Cases.

Statute Involved.

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C. Title 15, Sec. 1), known as the Sherman Law, provides in part as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Summary Statement of the Matter Involved.

Petitioners are General Motors Corporation (herein called GMC), which manufactures General Motors automobiles,[3] and three wholly-owned subsidiaries,[4] namely, General Motors Sales Corporation (herein called GMSC), the

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[1] R. 4630.
[2] R. 4635.
[3] Ind. pars. 1, 30, R. 2, 8.
[4] R. 77-8.

selling agency for all General Motors automobiles,[5] and General Motors Acceptance Corporation and General Motors Acceptance Corporation of Indiana, Inc. (herein together called GMAC), discount companies engaged in financing the wholesale purchase and retail sale of General Motors automobiles by dealers.[6] There were also 19 individual defendants named in the indictment[7] who constituted the policy-determining body of petitioners.[8] The case was dismissed as to two of these at the opening of the trial[9] and the remaining 17 were acquitted by the jury.[10]

There are approximately 15,000 General Motors dealers in the United States who buy General Motors automobiles at wholesale from GMSC and sell them at retail.[11] They are independent economic units with their own invested capital.[12] The franchises under which they operate do not require the use of GMAC or make any reference to financing.[13]

The indictment charges that the petitioners have conspired to restrain the interstate trade and commerce in General Motors automobiles sold by GMC through GMSC to 15,000 General Motors dealers throughout the United States;[14] that the purpose of such conspiracy was to secure a monopoly of the business of financing the wholesale purchase by dealers of General Motors automobiles and the retail sale by them of both General Motors automobiles and used automobiles taken in trade;[15] and that such conspiracy

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[5] Ind. par. 5, R. 3.
[6] Govt. Ex. 34, R. 3294.
[7] Ind. par. 32, R. 9.
[8] R. 78.
[9] R. 69.
[10] R. 1970-1.
[11] Ind. par. 4, R. 3.
[12] R. 4582.
[13] Govt. Exs. 13A to 13J, 14, R. 2541-2935.
[14] Ind. pars. 5, 34, R. 3, 9.
[15] Ind. par. 35, R. 10.

was to be effectuated by engaging in a course of conduct towards such dealers calculated to induce their use of GMAC financing, which was summarized by the court below as follows:[16]

> Requiring dealers to promise to use GMAC exclusively as a condition to obtaining a franchise for the sale, transportation and delivery of automobiles;
>
> Making contracts for short periods and cancellable without cause, cancelling or threatening to cancel such contracts unless GMAC facilities are used;
>
> Discriminating against dealers not using GMAC by refusing to deliver cars when ordered, delaying shipment and shipping cars of different number, model, color and style;
>
> Compelling dealers to disclose how they finance their wholesale purchases and retail sales, examining and inspecting dealers' books and accounts in order to procure this information, and requiring dealers to justify their using other financing media;
>
> Giving special favors to dealers using the wholesale and retail facilities of GMAC;
>
> Granting special favors to GMAC which are denied to other discount companies;
>
> Giving dealers a rebate from the GMAC finance charge paid by the retail purchaser, in order to induce use of GMAC financing facilities;
>
> Compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means.

The evidence offered by the Government upon the trial consisted in part of forms used by petitioners in carrying on their business, announcements to dealers with respect thereto and statements of policy appearing in annual and

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[16] R. 4576-7.

other reports, and in part of testimony and other evidence concerning the acts and declarations of petitioners' agents and employes in their contact with dealers.

The documentary evidence showed[17] that petitioners had cooperated in advancing their common interest and disclosed that their policy had been to urge the fair treatment by dealers of retail customers by offering them the advantage of financing on terms as favorable as those available through GMAC.

The evidence concerning the treatment of dealers was confined to the experiences of 75 dealers[18] out of an aggre-

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[17] Govt. Ex. 3, R. 2355; Govt. Ex. 22, R. 3072, 3098-9, 3141-2.

[18] The Government called 47 General Motors dealers whose testimony covered their own experiences and those of two other dealers, making 49, to wit: Ackerman (R. 344); Anderson (R. 756); Blades (R. 666); Burger (R. 360); Burwell (R. 703); Cooke (R. 409); Craig (R. 693); Darling (R. 701); Disher (R. 567); Dollahan (R. 628); Downs (R. 699); Elliott (R. 593); Emich (R. 293); Fox (R. 411); Freund (R. 684); Geiger (R. 684); Harris (R. 511); Hellman (R. 522); Jones (R. 743); Kensinger (R. 372); Kessler (R. 654); Light (R. 589); Magers (R. 410); Martin (R. 737); Medcalf (R. 643); Mendez (R. 257); Miller (R. 676); Morrow (R. 775); Moyer (R. 326); Munson (R. 714); McCrary (R. 604); McDonald (R. 757); McGuire (R. 704); Neidhard (R. 617); Two other dealers in Cincinnati, Ohio (R. 619); Patterson (R. 561); Peterik (R. 648); Phillips (R. 416); Randel (R. 445); Smith (R. 503); Stolz (R. 688); Street (R. 680); Teague (R. 397); Traendly (R. 446); Underwood (R. 622); Weaver (R. 287); Wilson (R. 339); Wulliger (R. 546).

The Government also called four witnesses who were not dealers who testified about 17 additional General Motors dealers, to wit: Downtown Chevrolet Co., St. Louis, Mo. (R. 226); North Side Chevrolet Co., St. Louis, Mo. (R. 230); Patterson Chevrolet Co., St. Louis, Mo. (R. 231); Main Street Motor Co., Carlinville, Ill. (R. 234); Pontiac dealer at Carlinville, Ill. (R. 237); J. B. Baldwin, Inc., Winslow B. Felix, Spencer Kennelly, Gordon Warren, Bannon McGuire, J. V. Hough and T. H. McDearmon, California dealers (R. 502-503); Riley Chevrolet Co., Manchester, N. H. (R. 519); Another dealer whose name witness Young did not remember (R. 515); Beckwith Chevrolet Co., Bristol, Conn. (R. 518); Allen Chevrolet Co., Fort Wayne, Ind. (R. 735); South Side Chevrolet Co., Fort Wayne, Ind. (R. 735).

gate of more than 50,000 who functioned during the period of the alleged conspiracy.[19]

At the close of the Government's case, petitioners moved to dismiss and the trial court denied the motion.[20]

In the course of the presentation of petitioners' case, the trial court excluded evidence offered on two points. The first was evidence intended to show that GMAC rates were lower than the rates of other discount companies and that the practices of the latter were injurious to GMC, General Motors dealers and the buying public.[21] The second was evidence concerning the treatment by petitioners of dealers other than the 75 referred to in the Government's evidence, offered for the purpose of refuting the inference that the petitioners had conspired to treat all dealers in the manner indicated by the experiences of the 75.[22]

In his charge the trial court stated to the jury that the amount of commerce involved was not necessarily controlling, and gave the following illustration:[23]

The Government also offered in evidence 55 territorial managers' reports which referred to 9 additional dealers, to wit: Elledge-Barcroft, Granite City, Ill. (R. 3917); Ritchie (R. 3917); Campbell Auto Co., Richmond, Ind. (R. 3936); Lawrence Chevrolet, Winchester, Ind. (R. 3939); Fowler Chevrolet Sales, Charlotte, Mich. (R. 3944); Larson Chevrolet Co., Superior, Wis. (R. 3950); Century Motor Corp., Gary, Ind. (R. 3959); Verney J. Reynolds Co., Allegan, Mich. (R. 3969); Bel-Park Auto Sales, Chicago, Ill. (R. 3993).

[19] The conspiracy is supposed to have originated in 1925 (R. 4593). Defendants' exhibit 122-A shows the exact number of General Motors dealers each year from 1927 to 1938 (R. 4549). The record also shows that there is an average annual turnover of 15 per cent (R. 1388). This rate of turnover applied to the numbers of dealers from 1927 to 1938 shows that during that period there were, first and last, 51,810 dealers.

[20] R. 823-7.

[21] R. 893-6.

[22] R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8.

[23] R. 1937-8.

> "If a group of Indiana farmers, or two Indiana farmers, should stop a truck coming from Illinois loaded with corn because they did not want any Illinois corn in Indiana and prevent its entry, that is an unreasonable interference with interstate commerce, although it involves only one truck load of corn."

After the jury had retired they returned to the courtroom and asked the following question:[24]

> "It seems, your Honor, that a great many difficulties arose from the fact of Section 72, in regard to whether, if the defendants are found guilty of conspiracy and coercion, they would automatically be found guilty of this conspiracy in restraint of trade and commerce. If the evidence shows that they have coerced and conspired, would that mean that this conspiracy consisted of restraint of trade and commerce?"

The jury's difficulty may be understood from the fact that in the course of his main charge, the trial court had said:[25]

> "If the Government has proved beyond a reasonable doubt the acts averred to in this indictment, you have a right to find these defendants guilty."

In reply to the jury's inquiry, the trial court stated:[26]

> "As I said to you yesterday, the ultimate question for you to decide is this: Did the defendants conspire to restrain unreasonably or restrict unreasonably interstate commerce in General Motors cars? That is the ultimate question, but involved in that are the questions of fact as to whether the means that are set up

[24] R. 1948.
[25] R. 1940.
[26] R. 1949.

> in the indictment, the acts constituting the means by which the alleged conspiracy was effectuated, have been proved."

And further:[27]

> "It is the theory of the Government, and a theory which has been sustained by the court on demurrer, as constituting a valid charge under the anti-trust law, that the defendants proceeded beyond acts proper in themselves and arrived at a place where their acts were not proper, acts which prevented free action by their dealers in the selection of a financing company."

And further:[28]

> "The ultimate question, after all, is whether, under all the facts and circumstances the acts of coercion mentioned in the indictment and set up in the indictment have been proved beyond all reasonable doubt, and, second, if they have been so proved, whether they, as a result, effectuated an unreasonable restraint on the interstate commerce in General Motors automobiles. If they effectuated a restraint, then you have got to determine, from all the facts and circumstances, whether it was an unreasonable restraint."

The decision of the Circuit Court of Appeals upholding petitioners' conviction rested on three propositions, namely, (1) that the evidence was sufficient to show a conspiracy having as its purpose the control by petitioners of dealers' financing;[29] (2) that the coercion shown was aimed to compel dealer-purchasers to use GMAC in financing the whole-

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[27] R. 1949.
[28] R. 1950.
[29] R. 4603.

sale purchase and retail sale of General Motors cars;[30] and (3) that the conspiracy had effectuated a restraint on the commerce in General Motors automobiles.[31]

The restraint referred to in the third holding is described in what might be called the crucial paragraph of the opinion, which was deleted[32] by the court on petition for rehearing and a revised text substituted. The substituted text is as follows:[33]

> "Obviously, if a customer * * * failed to purchase a General Motors car because he preferred another discount service, there would be a restraint of trade in General Motors cars, for the sale might have been consummated had the dealer and customer been free to use the service of other discount companies. Clearly the coercive and discriminatory practices employed by the appellants tended to reduce the supply of General Motors cars in the channels of trade, and did impede the free movement of that commerce from the factory to the ultimate car owner."

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[30] R. 4603.

[31] R. 4605.

[32] The deleted paragraph of the original opinion of the Circuit Court of Appeals was as follows (R. 4634):

> "The record shows instances where GMAC would refuse credit to a retail customer or where a retail customer would fail to purchase a General Motors car because he was either dissatisfied with the GMAC service or preferred to use the service of other discount companies. Certainly in these cases the practice of coercing General Motors dealers to use GMAC would result in a restraint of trade inasmuch as the sale might have been consummated if the dealer and customer had been free to use the finance services of the other discount companies. Clearly the many restrictions imposed by the appellants upon the 15,000 independent General Motors dealers tended to reduce the supply of General Motors cars in the channels of commerce and trade, and did impede the free flow of that commerce from the factory to the ultimate car owner."

[33] R. 4634.

The precise nature of the restraint is further defined in the following paragraph of the opinion:[34]

> "Undoubtedly the movement of a car from a dealer to a retail purchaser in the same state is intrastate commerce, if considered as an isolated event or as a free transaction in and by itself. The whole picture from the evidence, however, shows a constantly moving flow of General Motors cars, planned and calculated to pass from GMC through GMSC through the dealers to the consumers, in a background where production is projected in advance of retail orders and later adjusted to retail consumption at the production end of the movement. Moreover, as we have already pointed out, the retail and wholesale phases of the commerce in General Motors cars are mutually dependent; restraints placed upon one phase of the commerce necessarily affect the other phase; and without the retail sale there could be no wholesale transaction. The true perspective is to be drawn from the whole picture, and the interstate commerce involved in this case is that from the manufacturer, through the dealers, to the ultimate consumer. Even assuming that the only interstate commerce involved is the movement of cars from the factory to the dealers, a restraint imposed upon the movement of cars from the dealers to the retail public would necessarily affect the shipment and movement of the cars while unquestionably they are in interstate commerce, and consequently we need not really decide when the interstate commerce ends and that which is intrastate commerce begins."

In arriving at its conclusions respecting the sufficiency of the evidence to support the verdict of the jury as above set out (*supra*, pp. 8-9), the Court of Appeals upheld[35] the

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[34] R. 4611-12.
[35] R. 4617-22.

two rulings of the trial court excluding evidence offered by petitioners (*supra*, p. 6).

Questions Presented.

1. Do the activities of petitioners charged and proved constitute a conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law?

This question has several aspects, namely:

(a) Can a manufacturing corporation and its wholly-owned subsidiaries whose business has developed by internal growth and not through external acquisition, engage solely among themselves in a conspiracy within the meaning of Section 1 of the Sherman Law?

(b) Is a manufacturing corporation which sells its products (through a wholly-owned subsidiary) only to dealers who will use the financing of its discount company guilty of restraint of trade within the meaning of Section 1 of the Sherman Law?

(c) Is a manufacturing corporation which, in the interest of protecting the public and enhancing its goodwill, imposes upon dealers a limitation as to the maximum price at which the resale of its product may be financed, guilty of a restraint of trade within the meaning of Section 1 of the Sherman Law?

(d) Did the indictment allege facts sufficient to show that the purpose or effect of petitioners' activities was to fix or raise the price or curtail the supply of General Motors automobiles in the interstate market?

(e) Was the evidence sufficient to show that petitioners' activities were intended to fix or raise the price or curtail the supply of General Motors automobiles in the interstate market or were sufficiently widespread to have that effect?

2. Did the Government establish the charge of a conspiracy directed against the entire body of General Motors dealers (admittedly numbering 15,000 at the time of the indictment but embracing more than 50,000 during the period of the alleged conspiracy) by proof of petitioners' activities in respect of a total of 75 such dealers?

3. Did the trial court err in excluding evidence proffered by petitioners with respect to their treatment of dealers other than the 75 dealers covered by the Government's evidence?

4. Did the trial court err in excluding evidence proffered by petitioners with respect to the rates and practices of outside finance companies and their effect upon the merchandising of General Motors automobiles?

5. Did the trial court err in charging the jury?

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the action of the trial court overruling the demurrer to the indictment;

2. In holding that the activities of petitioners as established by the evidence constituted a conspiracy in restraint of trade;

3. In holding that the activities of petitioners as established by the evidence constituted a restraint of trade directed at or actually affecting the price or supply of General Motors automobiles in the interstate market;

4. In holding that the Government had established beyond a reasonable doubt the existence of the conspiracy charged in the indictment;

5. In refusing to hold that the trial court erred in excluding evidence proffered by petitioner to show that GMAC rates were lower than those of other discount companies and that such companies permitted practices inconsistent with good merchandising of automobiles;

6. In refusing to hold that the restraint, if any, imposed by petitioners was reasonable and in the interest of protecting and expanding their goodwill and that of the dealers and for the purpose of forwarding their legitimate personal interest;

7. In refusing to hold that the trial court erred in excluding evidence concerning the experiences of dealers proffered by petitioners for the purpose of showing the non-existence of a conspiracy directed against all dealers to compel them to use the services of GMAC;

8. In sustaining the trial court's charge to the jury to the effect that the amount of commerce involved in the restraint was immaterial;

9. In failing to hold that the trial court did not make clear to the jury that they must find that commerce was restrained in addition to finding that the petitioners had engaged in the activities charged in the indictment.

Reasons for Granting the Writ.

I.

THIS PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE WHICH HAVE NOT BEEN BUT SHOULD BE AUTHORITATIVELY DETERMINED BY THIS COURT.

In denying the motion of defendants made at the close of the Government's case to direct a verdict of not guilty, the trial judge said:[36]

> "This case is, I think, without precedent.
>
> The theory that underlies the indictment is one which, so far as I have learned, is completely without antecedent in any preceding case. But I don't know that lack of precedent is a bar.
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> • • • • • •
>
> I observed in a late opinion of the Supreme Court that one of the Justices recently appointed expressly said that the court has been reconstructed. The fair implication of that opinion, as I read it, is that precedents may be of little avail and their lack no bar.
>
> • • • • • •
>
> But the occurrences that I have mentioned frequently place me in situations presenting serious questions. I find myself in a quandary as to when and how often a district judge should express his own solemn convictions.
>
> I am not saying that I have any in this case, but we have here a situation where, if I should allow this motion, there is no opportunity upon the part of the Government to have a review by the Supreme

[36] R. 825-7.

> Court, the action of which I cannot undertake to foretell, the decision of which I feel in no wise capable of prognosticating. If I should allow this motion the Supreme Court would not have the opportunity to decide what the law is in a case which is, as I have said, without precedent.
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> * * * * * *
>
> It seems to me that unless I shall say, as a matter of law, that this theory of the government must be condemned, unless I can say, wholly on my own conviction, and with confidence, that I should deny anybody the chance to go to the Supreme Court, unless I can condemn with confidence and with assurance the legal theories embraced in this prosecution, and satisfy my own conscience as a trial judge that I have done the right thing in depriving the government of its chance to submit the matter to the Supreme Court, it is my duty to deny the motion."

It is, we believe, a matter of fair inference from the foregoing that the trial judge was doubtful of the Government's theory, even if he was not conscientiously convinced that the defendants were correct in their contentions. Though normally in a criminal prosecution all doubts are resolved in favor of the accused, the judge apparently was swayed by considerations of public interest to deny the motion, thus compelling the petitioners to run the risk of conviction for having engaged in a course of conduct which, in his view, was of doubtful criminality. If those considerations of public interest constituted a proper stimulus for the judge's action, they should be equally potent in persuading this Court to take jurisdiction.

That these petitioners have a vital stake in this litigation which makes it desirable for them to be accorded the

privilege of a hearing before the Court needs no argument.[37] But above all it is important, not only for these petitioners but also for business in general, to have this Court determine definitively whether the regulatory scope of the Sherman Act is fixed by the landmarks of past decisions or is to be broadened to include within its ban such activities as are here charged against the petitioners under what the trial judge deemed to be an unprecedented theory. So the interests of the general public and of the governmental law enforcement agencies coincide in this case with those of petitioners in furnishing persuasive reasons why this Court should take jurisdiction.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN APEX HOSIERY CO. v. LEADER, 310 U. S. 469, AND WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE INTERPRETATION OF SAID DECISION.

It is proper to state that the remarks quoted in the preceding point were made by the trial judge before the case of *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, was decided by this Court. The opinion therein, after surveying the legislative history of the Sherman Law, the evils it was aimed at and the scope and meaning of the term "restraint of trade" under the common law, discusses at length the relevant decisions of this Court, and restates

[37] The government has instituted an equity suit against petitioners in the Northern District of Illinois, based upon the judgment in this case, to divorce GMAC from GMC. By order of July 15, 1941, the court in that case extended the time to answer, plead, or move until the further order of the court, for the purpose of awaiting the final decision in this case.

the criteria to be applied in determining in a given case whether the Sherman Law has been violated.

The essential elements of a Sherman Law offense are outlined thus (p. 500):

> (1) There must be a restraint of trade. This is defined to be synonymous with a restraint of commercial competition.
>
> (2) Such restraint must (a) be intended to fix or raise prices or to affect supply in the interstate market or (b) be so widespread as necessarily to have that effect.

THE FIRST ESSENTIAL ELEMENT.

Behind the Court's holding that the forbidden restraints are restraints of competition lies an implication vital to the issues of this case. Restraint of competition is the antithesis of freedom of competition which it is the object of the statute to preserve. Freedom of competition posits the freedom of the competitor to conduct his own business, untrammeled by restrictions imposed by third parties. Therefore, restraints wholly self-imposed by the trader in respect of his own business are not within the ban of the Statute. Consequently there is implicit in the holding that restraint of trade is synonymous with restraint of competition a reaffirmation of the doctrine asserted in *United States* v. *Colgate & Co.*, 250 U. S. 300, 307, and *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, 573, that a manufacturer has the right to exercise his own independent discretion as to the parties with whom he will deal.

Another implication flowing from the Court's language is the involvement of at least two competitors. It may be that the restraint is mutually imposed among the competitors, as in *Addyston Pipe Co.* v. *United States*, 175 U. S.

211. Again the restraint may be imposed upon competitors by a non-competitor, as in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. The restraint, however, must originate at least in part from sources having no lawful economic control over the party whose competition is restricted. Diversity of economic control must therefore be the measure of distinctness required of the two or more participants in a combination or conspiracy to restrain trade. Thus *United States* v. *General Electric Co.*, 272 U. S. 476, holds that a combination between a company and a plurality of distinct legal entities is not prohibited by the Sherman Law where unity of economic control is effected through the relationship of principal and agent.

The petitioners constitute an economic unit (*supra*, pp. 2-3). Despite this fact, the Circuit Court of Appeals determined (a) that petitioners could engage in a Sherman Act conspiracy, and (b) had done so by refusing to sell their products to dealers failing to patronize GMAC. This cannot be explained by saying that the dealers are parties to the combination. There is no such reference to them in the indictment and they cannot be brought in as "persons and corporations to the Grand Jurors unknown"[38] because the indictment itself makes it clear that they were as a class an integral part of the situation with which the Grand Jury was concerned and many dealers testified before it.

The determination of the Circuit Court of Appeals herein is directly in conflict with the decision in the *Apex* case, in the foregoing particulars.

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[38] Ind. par. 34, R. 9-10.

THE SECOND ESSENTIAL ELEMENT.

This relates to the intended or actual effect of the restraint in interfering with the marketing of goods across State lines. We shall consider the intended effect and the actual effect separately.

Intended effect of alleged restraint. The Circuit Court of Appeals has squarely decided that there was no intent on the part of petitioners to restrict the marketing of General Motors automobiles across State lines, which was the specific charge of the indictment.[39] Such an intent would impute to petitioners the purpose of deliberate commercial self-destruction. Instead the Court has expressly found that petitioners' objective was to stimulate GMAC financing,[40] which applied to the resale of used cars taken in trade as well as to the purchase and sale of General Motors cars. Financing is not commerce. *Hemphill* v. *Orloff*, 277 U. S. 537. Consequently, there was not only no intent to effectuate the restraint of commerce charged in the indictment but no intent to effectuate any restraint of commerce.

Actual effect of alleged restraint. To affirm the judgment of conviction the Circuit Court of Appeals must therefore have found that petitioners' activities were so widespread as to fix or raise the prices or affect the supply of General Motors automobiles.

Such a conclusion is in direct conflict with the holding of this Court in the *Apex* case. The manner in which interstate marketing was affected is explained in the Court of Appeals' opinion in the passage quoted above on page 10 of this petition. At the beginning of that passage the Court seems to invoke the stream of commerce doctrine, but in

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[39] Ind. par. 34, R. 9-10.

[40] R. 4603, 4633.

the last sentence it recedes from that position[41] and takes its stand upon the theory that the restriction on the dealer prevents the sale at retail of a car and thus interferes with the shipment of another car in interstate commerce to replace it.

The factual situation here presented differs from that in the *Apex* case only in this, that whereas there the interference was applied to the process of production at the place of inception of the interstate commerce, here the interference was applied to the process of local sale at the place of termination of the interstate commerce. The present case is in this respect precisely analogous to *Levering & G. Co.* v. *Morrin*, 289 U. S. 103. The decision of the Circuit Court of Appeals herein is therefore in direct conflict with both the *Apex* case and the *Levering* case.

The holding in the present case conflicts also with two other recent decisions, *Albrecht* v. *Kinsella*, 119 F. (2d) 1003, and *International Ladies' G. W. Union* v. *Donnelly G. Co.*, 119 F. (2d) 892, both of which harmonize with the decision in the *Apex* case. Surprisingly enough, the former was decided by the Court of Appeals for the Seventh Circuit. The latter was decided by the Court of Appeals for the Eighth Circuit.

The present decision also conflicts with *United States* v. *Gold*, 115 F. (2d) 236, 238. It is there stated that it is

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[41] This was inevitable as the case went to the jury on the theory that the interstate commerce affected was that from factory to dealer (R. 1859, 1927). Moreover, the theory that the retail sale of General Motors automobiles is part of the interstate commerce from factory to dealer is legally untenable. *Schechter Corp.* v. *United States*, 295 U. S. 495, 542; *Atl. C. L. R. R.* v. *Standard Oil Co.*, 275 U. S. 257, 267; *Public Utilities Comm.* v. *Landon*, 249 U. S. 236, 245. The theory that the retail sale of used cars taken in trade is part of the interstate commerce from factory to dealer would be fantastic. But the Court would have been driven to that position if it had adopted the stream of commerce theory.

necessary under the *Apex* rule (where intent is absent) to prove an interference with the market so widespread as to affect prices or supply. If this be so, the judgment of affirmance in this case involves either a different interpretation of the *Apex* case or a finding that price or supply were thus affected.

However, the subject of price has never entered the case in any form. It is referred to nowhere in the indictment. The Government offered no evidence with regard to it and when the petitioners offered such evidence it was excluded on the Government's objection. Indeed the Government conceded that price was not involved.[42] The opinions of the court below do not refer to the subject of price nor to any intent on the part of petitioners to fix or raise prices nor do they mention any such effect.

If we examine the Court's holding on the issue of the supply of General Motors automobiles, we find, referring again to the foregoing excerpt from Judge Kerner's opinion (*supra*, p. 10), that in his view the restraint consists merely in the election of GMC to manufacture fewer automobiles. This represents nothing more than the lawful determination of a manufacturer to curtail his own production. The statement that the supply of General Motors cars in the channels of trade was reduced involves a misconception. In order to come within the *Apex* rule, the reduction must take place, altogether or to some extent at least, in a supply originating with an economic unit independent of the author of the restraint. The fact is, however, that there was no reduction in supply. On the contrary there was a constant and rapid increase throughout the period of the supposed conspiracy which reached the most remarkable proportions.[43]

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[42] R. 894, 959, 1857.
[43] Def. Ex. 120-A, R. 4549.

If the writ herein prayed for be granted, this Court will have an opportunity authoritatively to express its views on the foregoing questions arising under its decision in the *Apex* case, which are of general and vital public interest, as well as to resolve the conflict in the holdings of the several Circuit Courts of Appeals as outlined above.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE SECOND AND EIGHTH CIRCUIT COURTS OF APPEALS ON THE SAME MATTER.

The Seventh Circuit Court of Appeals, in the instant case, held that a manufacturing corporation and its subsidiaries which restricted the sale of the manufacturer's product to those who refrained from using outside financing *were guilty* of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Law.

The Second Circuit Court of Appeals, in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, held that a manufacturing corporation which restricted the sale of its product to wholesalers *was not guilty* of a restraint of trade in violation of Section 1 of the Sherman Law.

The Eighth Circuit Court of Appeals, in *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, in a full opinion by Judge Sanborn, held that a manufacturing corporation and its employe who restricted the sale of the manufacturer's product to those who refrained from dealing in the products of the manufacturer's competitors *were not guilty* of a conspiracy in restraint of trade in violation of Section 1 of the Sherman Law.

The conflict between these decisions is irreconcilable. The only restraint of interstate commerce here charged or proved consists of the refusal of a manufacturer to ship to particular dealers. That is the theory on which the Government went to the jury[44] and it is the theory on which the Circuit Court of Appeals upheld the conviction.[45] In the Second and Eighth Circuit cases identical restraints were held innocent. In the former Judge Lacombe said (p. 49):

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

We respectfully submit that this conflict between the Circuits should be resolved by this Court.

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[44] R. 1859.
[45] R. 4611-12.

IV.

THE CIRCUIT COURT OF APPEALS HAS SO FAR SANCTIONED A DEPARTURE BY THE LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. The indictment charged[46] and the Circuit Court of Appeals held[47] that the object and purpose of the conspiracy was to monopolize the financing of General Motors cars. Petitioners denied this charge and contended throughout the trial and in the Circuit Court of Appeals that the motive for their financing activities was the protection of GMC, General Motors dealers and the buying public from evils inherent in uncontrolled financing.[48] By way of supporting this contention they offered, *inter alia*, evidence that the rates of other discount companies were higher than those of GMAC and that their practices were injurious to automobile merchandising.[49] The trial court excluded this evidence[50] and the Circuit Court of Appeals held that this was not error.[51]

This ruling would appear to be in direct conflict with *Chicago Board of Trade* v. *United States*, 246 U. S. 231. The Court of Appeals attempted to distinguish that case by saying that there "the Government had not shown the actual or probable effect of the restraint upon interstate commerce."[52] But the fact is that the government had made precisely that showing, for this Court said that the legality

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[46] Ind. par. 35, R. 10.
[47] R. 4603, 4633.
[48] R. 4620.
[49] R. 4619.
[50] R. 893-6.
[51] R. 4622.
[52] R. 4621.

of the arrangement could not "be determined by so simple a test, as whether it restrains competition" (p. 238). The true test was said to be whether the restraint merely regulates and thereby promotes competition or suppresses it. As to the evidence on which that issue is to be decided, this Court said (p. 238):

> "To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

To the same effect is *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360-361.

We submit therefore that the exclusion of such evidence when offered by petitioners was clear error and error of such serious proportions and consequences as to call for the intervention of this Court.

Another important question is raised by the ruling under discussion which this Court should set at rest. May a trader, in the interest of protecting the public and enhancing his goodwill, impose upon dealers a limitation as to the *maximum* price at which an article may be resold while leaving the dealer free to sell as low as he pleases? See *Pick Mfg. Co.* v. *General Motors Corporation,* 80 F. (2d) 641, 653; affirmed, 299 U. S. 3; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 406-408. Basically, that problem is involved here, although the exact point is whether the manufacturer has the right to limit his dealers to a maximum charge for retail financing without restricting them in regard to the resale price of the automobiles

themselves. Whether such a restriction (which is the essence of the new low cost philosophy) is reasonable, has never been decided by this Court or any inferior tribunal. In *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 223, there is an intimation that any interference with the price structure, whether by way of raising, lowering or stabilizing prices, violates the law. This is not confined to the lowering of prices as a means of destroying competition. In the *Apex* decision, however, the ban of the law is seemingly confined by the express language of the opinion (310 U. S. 469, 500) to restraints which have the actual or intended effect of raising or fixing market prices. It would serve the public interest if this Court would render its definitive decision on the point involved. This case presents that opportunity.

2. The indictment charged a conspiracy to restrain the trade passing from GMS to General Motors dealers by treating all such dealers in the manner described in Paragraphs 36 to 62.[53] One way in which the Government sought to prove this conspiracy was by evidence that petitioners had treated 75 dealers[54] as the indictment charged they had conspired to treat all. First and last there were upwards of 50,000 dealers against whom the conspiracy was supposed to have been directed. Petitioners offered evidence of their treatment of other dealers, and were prepared to call such dealers until a showing representative of their treatment of all had been made. But the trial court excluded *all* such evidence.[55]

This deprived petitioners of the only practicable means of refuting the most important part of the Government's

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[53] R. 10-14.

[54] *Supra*, p. 5, footnote 18.

[55] R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8.

case against them and constituted, we submit, a denial of due process. It was a clear departure from the usual course of judicial proceedings. *Worthington* v. *United States,* 64 F. (2d) 936, 940-2.

Moreover, an important question of federal law is involved which has not been, but should be settled by this Court. *Wood* v. *The United States,* 16 Pet. 342, comes close and would seem to establish the admissibility of the evidence in question. See discussion at pages 358 to 362. This petition offers an opportunity to settle the point.

Conclusion.

For the reasons stated, the writ should issue as prayed.

Respectfully submitted,

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